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(6)

No. 06-562

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ATLANTIC RESEARCH CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF READING COMPANY AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

JAMES C. MARTIN*
ROBERT P. FRANK
REED SMITH LLP
2500 One Liberty Place
1650 Market Street
Philadelphia, PA 19103-7301
Telephone: 215.851.8100
Facsimile: 215.851.1420
*Counsel of Record

Counsel for Amicus Curiae Reading Company

TABLE OF CONTENTS

Page

I. STATEMENT OF INTEREST 1

II. ARGUMENT 3

A. No Right Of Action Under CERCLA § 107(a)(4)(B) Should Be Provided For PRPs Ineligible To Use CERCLA § 113 Because Providing Such A Right Of Action Under CERCLA Will Defeat The Purpose Of Bankruptcy Proceedings 3

1. The Construction Of CERCLA § 107(a)(4)(B) Should Not Exacerbate An Inherent Tension Between CERCLA And The Bankruptcy Code 3

2. Providing A PRP Who Is Ineligible To Bring A Contribution Action Under CERCLA § 113 With An Independent Right Of Recovery Under CERCLA § 107(a)(4)(B) Would Exacerbate Tension Between CERCLA And The Bankruptcy Code And Materially Disrupt Bankruptcy Proceedings 5

3. To Preserve The Paramount Purposes Of Bankruptcy Proceedings, Private Parties Who Are Ineligible To Bring A Contribution Action Under CERCLA § 113 Should Not Be Provided With An Independent Right Of Recovery Under CERCLA § 107(a)(4)(B) 11

B. If A Right of Action Under CERCLA § 107(a)(4)(B) Is Provided For PRPs Ineligible To Use CERCLA § 113, Then That Right Of Action Should Be Characterized As An Implied Right Of Contribution To Accommodate The Purposes Of Bankruptcy Proceedings 18

C. If A CERCLA § 107(a)(4)(B) Right Of Action By PRPs Ineligible To Use CERCLA § 113 Is Characterized As One For Cost Recovery, Reorganized Companies And Discharged Individuals Who Have Settled Or Discharged CERCLA Liability To The Government In Bankruptcy Should Not Be Subject To Suit In Such Actions 22

III. CONCLUSION 23

TABLE OF AUTHORITIES

Pages

CASES

Akzo Coatings, Inc. v. Aigner Corp.,
30 F.3d 761 (7th Cir. 1994).....9

AM Int'l, Inc. v. Datacard Corp.,
106 F.3d 1342 (7th Cir. 1997).....17

Cooper Industries, Inc. v. Aviall Services, Inc.,
543 U.S. 157 (2004)..... *passim*

Grogan v. Garner,
498 U.S. 279 (1991).....4

In re Chateaugay Corp.,
112 B.R. 513 (S.D.N.Y. 1990),
aff'd, 944 F.2d 997 (2d Cir. 1991).....10, 13

In re Chateaugay Corp.,
944 F.2d 997 (2d Cir. 1991)..... *passim*

In re Combustion Equipment Associates, Inc.,
838 F.2d 35 (2d Cir. 1988).....3

In re Jensen
127 B.R. 27 (B.A.P. 9th Cir. 1991).....12

In re Jensen,
995 F.2d 925 (9th Cir. 1993).....5, 12

In re National Gypsum,
139 B.R. 397 (N.D. Tex. 1992)..... *passim*

In re Penn Central Transp. Co.,
944 F.2d 164 (3d Cir. 1991).....13

In re Reading Co.,
24 B.R. 858 (E.D. Pa. 1980) 1

In the Matter of Chicago, Milwaukee, St. Paul & Pac. R.R. Co., 974 F.2d 775 (7th Cir. 1992) ..... *passim*

In the Matter of Reading Co., 900 F.Supp. 738 (E.D. Pa. 1995), *aff'd*, 115 F.3d 1111 (3d Cir. 1997) 12, 13

In the Matter of Reading Company,
115 F.3d 1111 (3d Cir. 1997) ..... *passim*

Key Tronic Corp. v. United States,
511 U.S. 809 (1994) 5, 6, 17

Local Loan Co. v. Hunt,
292 U.S. 234 (1934) 4

Midlantic Nat'l Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494 (1986) 5, 16

Morton v. Mancari,
417 U.S. 535 (1974) 5

New Castle County v. Halliburton NUS,
111 F.3d 1116 (3d Cir. 1997) 6, 17

Ohio v. Kovacs,
469 U.S. 274 (1985) 5, 15, 16

Pennsylvania Railroad Co. v. Reading Co.,
132 F. Supp. 616 (E.D. Pa. 1955), *aff'd*, 226 F.2d 958 (3d Cir. 1955) 1

Philadelphia v. Stepan Chemical Co.,
544 F. Supp. 1135 (E.D. Pa. 1982) 19, 20

Pinal Creek Group v. Newmont Mining Corp.,
118 F.3d 1298 (9th Cir. 1997) 21

Regional Rail Reorganization Act Cases,
419 U.S. 102 (1974) 5

Ruckelshaus v. Monsanto Co.,
467 U.S. 986 (1984) 5

Schweitzer v. Consolidated Rail Corp.,
758 F.2d 936 (3d Cir. 1985) 13

United States v. Union Scrap Iron & Metal,
123 B.R. 831 (D. Minn. 1990) ..... *passim*

United Technologies, Inc. v. Browning-Ferris Indus., Inc.,
33 F.3d 96 (1st Cir. 1994) 6, 7, 8

Walls v. Waste Resource Corp.,
761 F.2d 311 (6th Cir. 1985) 20

Wickland Oil Terminals v. Asarco, Inc.,
792 F.2d 887 (9th Cir. 1986) 19, 20

STATUTES

11 U.S.C. § 101(12) 10

11 U.S.C. § 101(5) 10

11 U.S.C. § 523(a) 16

11 U.S.C. § 727(b) 10

11 U.S.C. § 9606 7

11 U.S.C. § 9607 ..... *passim*

11 U.S.C. § 1141(d)(1)(A) 10

Comprehensive Environmental Response, Compensation and Liability Act of 1980

42 U.S.C. § 9601 *et seq.* 1

42 U.S.C. § 9607(a) 4, 8, 20

42 U.S.C. § 9607(a)(1)-(4) 4, 8

42 U.S.C. § 9607(a)(4)(A) 5, 8

42 U.S.C. § 9607(a)(4)(B) ..... *passim*

42 U.S.C. § 9613 ..... *passim*

42 U.S.C. § 9613(f)(1) 5, 7, 8

42 U.S.C. § 9613(f)(2) 22

Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, 100 Stat. 1613 7

RULES

Sup. Ct. R. 37.3(a) 1
Sup. Ct. R. 37.6 1

MISCELLANEOUS

2-101 A.N. Resnick & H. J. Sommer, *Collier on Bankruptcy* ¶ 101.5[1] (15th ed. rev. 2006) 13

Ingrid Michelsen Hillinger & Michael G. Hillinger, *Environmental Affairs in Bankruptcy: 2004*, 12 Am. Bankr. Inst. L. Rev. 331 (Winter 2004) 11

Philippe J. Kahn, *Bankruptcy Versus Environmental Protection: Discharging Future CERCLA Liability in Chapter 11*, 14 Cardozo L. Rev. 1999 (1993) 11

I.

STATEMENT OF INTEREST

Reading Company ("Reading") submits this brief with the written consent of the parties and in support of the Petitioner. Sup. Ct. R. 37.3(a).[1]

Founded as a railroad in 1833, Reading grew to become "the largest corporation in the world" before filing for reorganization under Section 77 of the Bankruptcy Act of 1898 on November 23, 1971. *Pennsylvania Railroad Co. v. Reading Co.*, 132 F. Supp. 616, 617 (E.D. Pa. 1955), *aff'd*, 226 F.2d 958 (3d Cir. 1955); *In re Reading Co.*, 24 B.R. 858, 859 (E.D. Pa. 1980). Reading emerged from bankruptcy on January 1, 1981. *In the Matter of Reading Company*, 115 F.3d 1111, 1114-15 (3d Cir. 1997). Just three weeks before Reading's emergence, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, "became law, effective immediately." *In the Matter of Reading Co.*, 115 F.3d at 1115.

The near-coincidence of CERCLA's enactment and Reading's emergence from reorganization has given Reading a unique vantage point on the intersection of CERCLA and bankruptcy law. Reading litigated perhaps the principal appellate decision dealing with CERCLA claims privately asserted after a bankruptcy's conclusion and based on operations undertaken and completed before the bankruptcy ended. *See In the Matter of Reading Company*, 115 F.3d 1111. Moreover, even after its reorganization, Reading still

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[1] Pursuant to Rule 37.6, Reading affirms that no party or their counsel authored, or paid for, this brief in whole or in part.

faces the threat of CERCLA claims arising from rail operations started and finished before its bankruptcy ended. Accordingly, Reading's interest in the nature and scope of contribution and cost recovery rights provided to private parties under CERCLA is immediate and direct.

The issue before this Court involves what rights of recovery, if any, exist under CERCLA § 107 for a potentially responsible party ("PRP") who cannot use the express provision for contribution found in CERCLA § 113. Specifically, the facts before this Court involve a claim made by a PRP under CERCLA § 107(a)(4)(B). Those facts, however, do not involve a reorganized company like Reading. Reading therefore respectfully submits this amicus brief to offer this Court a perspective on how the CERCLA cost recovery issue before it impacts reorganized companies.

In that regard, Reading submits that, in considering whether a PRP who is unable to bring a contribution action under CERCLA § 113 may bring an action under CERCLA § 107(a)(4)(B), this Court should be cognizant of the competing goals of CERCLA and the Bankruptcy Code. Without recognition and accommodation of these competing goals, CERCLA § 107(a)(4)(B) actions asserted against reorganized companies or discharged individuals after a bankruptcy effectively could strip former debtors of the fresh start Congress intends bankruptcy proceedings to offer. Further, if the Court construes CERCLA § 107(a)(4)(B) to provide a right of action for those PRPs who cannot rely on § 113, Reading submits that this Court's construction should attempt to reconcile, or at least minimize, the potential for conflict with the Bankruptcy Code.

II.

ARGUMENT

A. No Right Of Action Under CERCLA § 107(a)(4)(B) Should Be Provided For PRPs Ineligible To Use CERCLA § 113 Because Providing Such A Right Of Action Under CERCLA Will Defeat The Purpose Of Bankruptcy Proceedings.

1. The Construction Of CERCLA § 107(a)(4)(B) Should Not Exacerbate An Inherent Tension Between CERCLA And The Bankruptcy Code.

An inherent tension exists between CERCLA and the Bankruptcy Code which this Court should acknowledge and minimize as it determines the availability of a right of recovery under CERCLA § 107(a)(4)(B) for PRPs ineligible to bring actions for contribution under CERCLA § 113. Lower courts have recognized "that the Bankruptcy Code and CERCLA point toward competing objectives" and that the two statutes "are in tension in significant respects." *In re Chateaugay Corp.*, 944 F.2d 997, 1002 (2d Cir. 1991); *In re National Gypsum*, 139 B.R. 397, 404 (N.D. Tex. 1992); *In the Matter of Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 974 F.2d 775, 779 (7th Cir. 1992). "The conflict begins at a basic level, since the goal of CERCLA – cleaning up toxic waste sites promptly and holding liable those responsible for the pollution – is at odds with the premise of bankruptcy, which is to allow debtors a fresh start by freeing them of liability." *In re Combustion Equipment Associates, Inc.*, 838 F.2d 35, 37 (2d Cir. 1988).

Thus, this Court has long recognized "that a central purpose of the [Bankruptcy] Code is to provide a procedure"

by which "'honest but unfortunate'" debtors can "reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.'" *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (quoting, in part, *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)). This purpose is recognized and applied in corporate reorganizations involving CERCLA liabilities. *Chateaugay*, 944 F.2d at 1002 ("The Code aims to provide reorganized debtors with a fresh start, an objective made more feasible by maximizing the scope of a discharge."); *National Gypsum*, 139 B.R. at 407; *United States v. Union Scrap Iron & Metal*, 123 B.R. 831, 835 (D. Minn. 1990).

Yet, while bankruptcy proposes to limit and discharge liability, CERCLA § 107(a) serves the opposite purpose – it aims to identify and impose liability on four broad categories of persons. As the United States notes in its petition for certiorari:

> Section 107(a) of CERCLA imposes liability for cleanup costs on four categories of "[c]overed persons – typically known as potentially responsible parties (PRPs) – associated with the release or threatened release of hazardous substances. ... PRPs are defined as (1) owners and operators of facilities at which hazardous substances are located; (2) past owners and operators of such facilities at the time that disposal of hazardous substances occurred; (3) persons who arranged for disposal or treatment of hazardous substances; and (4) certain transporters of hazardous substances.

2006 WL 3024300, at *3 (citations omitted); *see also* 42 U.S.C. § 9607(a)(1)-(4).

PRPs can be liable for cleanup costs to the government, to other PRPs, and to private persons who are not PRPs. *See* 42 U.S.C. §§ 9607(a)(4)(A), 9607(a)(4)(B), 9613(f)(1). It is the manner and timing of the recovery of these costs that creates the tension with the goals of bankruptcy proceedings. This Court's construction of CERCLA § 107(a)(4)(B) should be made with due regard for this tension and should limit it to the greatest extent possible. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) (citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133-134 (1974)), and quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *see also In re Jensen*, 995 F.2d 925, 928 (9th Cir. 1993) (noting conflict between CERCLA and the Bankruptcy Code and citing *Midlantic Nat'l Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494 (1986), and *Ohio v. Kovacs*, 469 U.S. 274 (1985), to observe that, despite these tensions, "the Supreme Court has indicated more than once that, if possible, these two conflicting objectives should be reconciled.").

2. Providing A PRP Who Is Ineligible To Bring A Contribution Action Under CERCLA § 113 With An Independent Right Of Recovery Under CERCLA § 107(a)(4)(B) Would Exacerbate Tension Between CERCLA And The Bankruptcy Code And Materially Disrupt Bankruptcy Proceedings.

Under CERCLA § 107, the "'cost recovery' section of CERCLA," the government may recover its response costs from PRPs whenever the government either has cleaned up a contaminated area or compelled PRPs "to perform the cleanup" under CERCLA. *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 161 (2004) (citing *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994)). "In general, a section 107 cost recovery action ... imposes joint

and several liability on" PRPs. *New Castle County v. Halliburton NUS*, 111 F.3d 1116, 1121 (3d Cir. 1997).

Certain private parties also may use CERCLA § 107 to recover the costs of cleanup. Specifically, "Section 107(a) provides that responsible parties are liable for 'any ... necessary costs of response incurred *by any other person* consistent with the national contingency plan.'" *Key Tronic*, 511 U.S. at 813 (citing CERCLA § 107(a)(4)(B)) (emphasis added). This Court has divided over the question of whether the private cause of action under CERCLA § 107(a)(4)(B) is expressly or impliedly granted. But the Court agrees that private parties have a right of action under CERCLA § 107. *Key Tronic*, 511 U.S. at 818 n.11 and 822 n.1 (Scalia, J., dissenting).

With respect to the right of action available under CERCLA § 107, however, this Court has left open the question of whether and under what circumstances private parties can use § 107(a)(4)(B) to recover the costs of cleanup. *Cooper Industries*, 543 U.S. at 169 (citing cases). That is the issue presented in the United States' certiorari petition.[2]

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2 In its petition for certiorari, the United States offers a plain reading of CERCLA § 107(a)(4)(B) to argue that the section does not authorize private PRPs to sue. It observes that "the most natural reading of the phrase 'any other person' [in § 107(a)(4)(B)] is that it excludes the persons who are the subject of the sentence, i.e. PRPs." 2006 WL 3024300, at *15. Those lower courts which have limited CERCLA § 107 to private parties who are not PRPs have likewise reasoned that it "'is sensible to assume that Congress intended only innocent parties – not parties who were themselves liable – to be permitted to recoup the whole of their expenditures.'" *New Castle County*, 111 F.3d at 1121 (citing and quoting *United Technologies, Inc. v. Browning-Ferris Indus., Inc.*, 33

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CERCLA § 107(a)(4)(B) is not, of course, the only way in which a private party might try to recover cleanup costs. In 1986, upon the enactment of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. 99-499, 100 Stat. 1613, CERCLA gained "an express cause of action for contribution, codified as CERCLA § 113(f)(1)...." *Cooper*, 543 U.S. at 162-63. Under CERCLA § 113:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title.

42 U.S.C. § 9613(f)(1).[3]

Two prerequisites must exist before a CERCLA § 113 claim for contribution can be asserted. First, the government must have acted under CERCLA § 106 or § 107(a) to sue the person who would bring a § 113 contribution claim. *Cooper*, 543 U.S. at 160-61. Second, there must be common liability between two parties liable to a third person. *Reading*, 115 F.3d at 1120-21, 1124 (citing cases) ("CERCLA contribution, like common law contribution, requires some

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F.3d 96, 100 (1st Cir. 1994)). Reading agrees with this position for the reasons advanced in this brief.

3 Before SARA was enacted, courts had allowed PRPs to obtain contribution from other PRPs by implying a right to contribution from either the text of the statute or federal common law. *Cooper*, 543 U.S. at 162 (citing cases); *see Reading*, 115 F.3d at 1118-19. Once again, however, this Court has not expressly decided "whether any judicially implied right of contribution survived the passage of SARA." *Cooper*, 543 U.S. at 171.

form of joint liability."); *United Technologies, Inc. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 103 (1st Cir. 1994) (the term "contribution" under § 113 "should be given its plain meaning."). Each party in a CERCLA § 113 action must be "liable or potentially liable" under CERCLA § 107 to a third party. 42 U.S.C. § 9613(f)(1).

In contrast to a claim under CERCLA § 113, only four prerequisites are necessary for a cost recovery claim under CERCLA § 107: (1) a facility from which there is (2) a release or threat of release of a hazardous substance into the environment (3) that causes either the government or a private party to incur costs of response, commonly called cleanup costs, which are recoverable (4) from one of the four categories of PRPs described in CERCLA § 107(a)(1)-(4). *Reading*, 115 F.3d at 1118; *see also* 42 U.S.C. § 9607(a).

Given these requirements, providing a private PRP with an independent cause of action under CERCLA § 107(a)(4)(B) opens the door to disruption of bankruptcy proceedings in two critical ways.

First, if a CERCLA § 107 action is extended independently to private PRPs, a settlement or discharge of CERCLA liability to the government effected by and during a bankruptcy would have diminished value to any debtor. As long as PRPs are restricted to CERCLA § 113(f)(1) claims for contribution, the viability of such CERCLA claims against a reorganized company or discharged individual depends on what the government does, or fails to do, to assert or preserve its own CERCLA § 107(a)(4)(A) claims during a bankruptcy. *Reading*, 115 F.3d at 1119-21, 1126 (post-bankruptcy contribution claim under CERCLA § 113 fails "as a matter of law" because the bankruptcy precludes the possibility of common liability to a third party once CERCLA liability to the government was discharged). Once the restriction to CERCLA § 113 is removed and CERCLA

§ 107(a)(4)(B) becomes available to a PRP, however, the settlement or discharge of CERCLA liability to the government during a bankruptcy will not protect a reorganized company because common liability *is not* expressly required for recovery under § 107.

Second, if CERCLA § 107(a)(4)(B) is extended independently to private PRPs, reorganized companies and discharged individuals who emerge from bankruptcy will be unable, despite their best efforts, to ascertain the effect of their discharge on CERCLA liability related to operations started and finished before the bankruptcy ended. A former debtor could no longer know that, by having discharged or settled CERCLA liability to the government during bankruptcy, it had gained protection against the post-bankruptcy assertion of CERCLA liability by PRPs for any operations started and finished before the bankruptcy ended.

Indeed, in such an environment, bankruptcies would become even more complex and costly than they are already. Because CERCLA § 107(a)(4)(B) allows the recovery of costs private parties have voluntarily incurred, some of the sites affected by a bankruptcy might not involve the government in any way. Other sites could be ones where EPA has ordered or performed a cleanup. In either event, though, CERCLA sites can involve dozens or even hundreds of PRPs. For example, the site at the center of *Reading* involved more than 600 PRPs, only 36 of which the United States ordered and later sued. *Reading*, 115 F.3d at 1116; *see also Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 762 (7th Cir. 1994) (involving a site where "more than 200 firms generated hazardous wastes" and EPA unilaterally ordered approximately 21 PRPs to conduct emergency cleanup). Faced with what could be hundreds of post-bankruptcy claims by PRPs, the former debtor would need to be able to demonstrate that each and every such CERCLA § 107(a)(4)(B) claim somehow was discharged or settled

during its bankruptcy. As a practical matter, that burden is not sustainable, and it is highly unlikely that all such claims could be recognized and discharged in a bankruptcy. And, faced with these uncertainties, the cost of reorganizing will increase, since lenders will need greater assurance that there are no contingent environmental liabilities which escaped the effects of discharge.

Moreover, as a legal matter, at any given site, some – possibly even all – of the CERCLA § 107(a)(4)(B) claims asserted after bankruptcy will fall outside of the Bankruptcy Code's definition of "claim" at the moment a bankruptcy discharge is granted. In corporate reorganizations under Chapter 11 of the Code, "the confirmation of a plan" of reorganization "discharges the debtor from any debt *that arose before the date of such confirmation....*" 11 U.S.C. § 1141(d)(1)(A) (emphasis added). Similarly, in individual bankruptcies under Chapter 7, with certain limited exceptions that do not expressly include CERCLA liability, an individual may be discharged "from all debts *that arose before the date of the order of relief....*" 11 U.S.C. § 727(b) (emphasis added).

"Because bankruptcy discharges liability only for claims that arose before the bankruptcy petition was filed, the focus of the Court's inquiry must be on when the CERCLA obligations arose." *In re Chateaugay Corp.*, 112 B.R. 513, 520 (S.D.N.Y. 1990), *aff'd*, 944 F.2d 997 (2d Cir. 1991). The timing of when "liability on a claim" – i.e., a "debt" under the Code – arises is therefore critically important to determine if a claim can be discharged in bankruptcy. *See* 11 U.S.C. §§ 101(5) and (12) ("claim" and "debt" defined). In considering the tension between CERCLA and bankruptcy, there is:

> a question at the heart of this tension: at what point does a party have a CERCLA claim for

> the purposes of bankruptcy so that the failure to raise the claim before bankruptcy bar dates forever bars the claim from being recognized against the successors to a reorganized company?

Chicago, Milwaukee, 974 F.2d at 779. .

And the tension is not easily resolved – if it can be resolved at all – because "there may exist considerable delay between environmental harm and the discovery of such harm," and because of divergent case law on when a party has a CERCLA claim recognizable in bankruptcy. *National Gypsum*, 139 B.R. at 408 n.27.

3. To Preserve The Paramount Purposes Of Bankruptcy Proceedings, Private Parties Who Are Ineligible To Bring A Contribution Action Under CERCLA § 113 Should Not Be Provided With An Independent Right Of Recovery Under CERCLA § 107(a)(4)(B).

In effect, three tests have emerged to determine when CERCLA claims arise for the purposes of bankruptcy.[4] Under the first test, "a claim exists only when the pre-bankruptcy relationship between the debtor and third party contained all the elements necessary to give rise to a legal obligation under" CERCLA. *Union Scrap*, 123 B.R. at 835. "Because EPA had incurred no response costs at the time of

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4 *See* Ingrid Michelsen Hillinger & Michael G. Hillinger, *Environmental Affairs in Bankruptcy: 2004*, 12 Am. Bankr. Inst. L. Rev. 331, 379-89 (Winter, 2004); *see also* Philippe J. Kahn, *Bankruptcy Versus Environmental Protection: Discharging Future CERCLA Liability in Chapter 11*, 14 Cardozo L. Rev. 1999, 2023-32 (1993).

... confirmation," the *Union Scrap* Court found that "the EPA could have no claim in the bankruptcy proceedings," since "there was no legal obligation under CERCLA." *Id.* at 836.

Under the second, at the opposite extreme, the existence of a claim depends on when the release or threat of release which gave rise to the CERCLA liability asserted post-bankruptcy first occurred. *In re Jensen*, 127 B.R. 27, 33 (B.A.P. 9th Cir. 1991); *Chateaugay*, 944 F.2d at 1005. And for the third, arguably a middle ground, courts have found CERCLA claims dischargeable in a bankruptcy "when a potential CERCLA claimant can tie the bankruptcy debtor to a known release of a hazardous substance which the potential claimant knows will lead to CERCLA response costs...." *Chicago, Milwaukee*, 974 F.2d at 786; *see also National Gypsum*, 139 B.R. at 407-08 (a CERCLA claim arises when "fair contemplation of future costs based on pre-petition conduct can occur at any particular site by the parties.").

The analytical framework of these three tests reveals more clearly the threat to bankruptcy proceedings of making a CERCLA § 107(a)(4)(B) independently available to PRPs ineligible to use CERCLA § 113.

PRPs come into existence continuously, as substances hazardous under CERCLA are generated, transported to, and released at a contaminated site. Years before emerging from reorganization, a reorganized company may completely cease to generate waste found at a contaminated site, or to transport waste to a site, but that site may remain open and accept waste for years after the reorganization ends. *Reading*, 115 F.3d at 1115-16, n.2 (noting that operations at the site began in 1941 but did not stop until 1985, more than four years after Reading emerged from bankruptcy on January 1, 1981); *In the Matter of Reading Co.*, 900 F. Supp. 738, 741-42 (E.D. Pa. 1995) (noting chronology of waste

shipments and bankruptcy), *aff'd*, 115 F.3d 1111 (3d Cir. 1997). Given these possibilities, there is little doubt that a person who was not a PRP during a bankruptcy can become one after the bankruptcy ends.

Although the express inclusion of contingent claims within the Bankruptcy Code's definition of "claim" at 11 U.S.C. § 101(5) initially might appear to preclude any question of post-bankruptcy exposure to liability under CERCLA § 107(a)(4)(B) for operations ended before a bankruptcy ends, the answer is not so simple. A CERCLA § 107(a)(4)(B) claim asserted by a PRP post-bankruptcy can be classified as a discharged contingent claim *only if* a relationship existed between the private CERCLA claimant and the debtor *during the bankruptcy*.[5]

Thus, it was the preexisting relationship between debtor and claimant during bankruptcy which led the Second Circuit in *Chateaugay* to classify CERCLA claims held by EPA as "'contingent,' rather than as ... outside the Code's

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5 A contingent claim concerning a future injury is not found to exist under bankruptcy law unless and until the private claimant who would suffer discharge of the claim is first found to have some sort of relationship to or knowledge of the debtor while the debtor was in bankruptcy. *See Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 943 (3d Cir. 1985) (tort claim in § 77 railroad reorganization); *Chicago, Milwaukee*, 974 F.2d at 782 (CERCLA claim in § 77 railroad reorganization); *Chateaugay*, 112 B.R. 513, 520 (S.D.N.Y. 1990), *aff'd*, 944 F.2d 997, 1003-06 (CERCLA claims in Ch. 11 reorganization); and *In re Penn Central Transp. Co.*, 944 F.2d 164, 167-68 (3d Cir. 1991) (refusing to find CERCLA liability, asserted after a completed § 77 reorganization, was discharged in 1979 during reorganization as a contingent claim because relationship necessary to sustain a contingent claim did not come into existence until CERCLA's enactment in 1980); *see also* 2-101 A.N. Resnick & H. J. Sommer, *Collier on Bankruptcy* ¶ 101.5[1] (15th ed. rev. 2006).

definition of 'claim,'" even though EPA did "not yet know the full extent of the hazardous waste removal costs it may one day incur and seek to impose upon" the debtor, and might "not yet even know the location of all the sites at which such wastes may yet be found." *Chateaugay*, 944 F.2d at 1005. "The relationship between the environmental regulating agencies and those subject to regulation provides sufficient 'contemplation' of contingencies to bring most ultimately maturing payment obligations based on pre-petition conduct within the definition of 'claims.'" *Id.* The claimant and the debtor knew each other: EPA was "acutely aware" of the debtor "and vice versa." *Id.*

Between PRPs in a CERCLA § 107(a)(4)(B) action, however, there will be *no relationship* remotely similar to that which exists between the government and a regulated debtor-PRP. A PRP who generates hazardous waste and has it sent to a landfill which later becomes subject to CERCLA and another PRP who generates hazardous waste and uses the same landfill may each know the owner or operator of the landfill. But these generator-PRPs have no reason to know or learn of the identity of the other until the government enforces CERCLA. As a result, the claims of such generator-PRPs against each other could not be treated as contingent claims that arose to be discharged in a bankruptcy.

For that reason, neither of the legal tests articulated in *Chateaugay* and *Chicago, Milwaukee* would offer a way to view such CERCLA § 107(a)(4)(B) claims as discharged contingent claims under the Bankruptcy Code. The only test that might arguably apply is the one used in *Union Scrap*, since it was developed and applied for a site where EPA did not know of the debtor's link to the contaminated site in question. However, the reasoning in *Union Scrap* does not foreclose post-bankruptcy assertions of CERCLA liability by private PRPs precisely because, in cases where the claimant

has no reason to link the debtor to a contaminated site, *Union Scrap* places the claim entirely outside the furthest reach of a bankruptcy discharge.

Under the holding of *Union Scrap*, the CERCLA § 107 claim of a private PRP would not exist *until* that PRP first incurred a cost it later tried to recover under § 107. If the PRP asserting CERCLA § 107(a)(4)(B) liability had only first incurred costs *after* confirmation of a plan of reorganization or discharge of an individual, that claimant "could have no claim in the bankruptcy proceedings" that would have been discharged. *Union Scrap*, 123 B.R. at 836. This outcome could occur even if the private claimant, as EPA did in *Union Scrap*, knew of the bankruptcy. *Id.* at 834.

Providing a right of recovery under CERCLA § 107(a)(4)(B) to such PRPs will effectively hand over the power to the PRP to circumvent a bankruptcy discharge merely by refusing to spend money. As an agency charged with protecting human health and the environment, EPA perhaps can be trusted, as it was in *Union Scrap*, with the discretion to decide when to incur response costs. As polluters, PRPs should not be routinely granted this same sort of ability to decide when a CERCLA claim that might otherwise be dischargeable in bankruptcy comes into existence.

Accordingly, none of the three tests used to determine when a CERCLA claim dischargeable in bankruptcy arises can prevent the CERCLA § 107(a)(4)(B) claims of PRPs from circumventing entirely the effects of a bankruptcy discharge. Allowing PRPs to bring such claims effectively will create a judicial exception to discharge. This Court has previously refused to create a judicial exception to discharge in bankruptcy when a state sought to exempt environmental obligations under an injunction obtained before bankruptcy from the scope of a bankruptcy discharge. *Kovacs*, 469 U.S.

at 278 ("Except for the nine kinds of debts saved from discharge by 11 U.S.C. § 523(a), a discharge in bankruptcy discharges the debtor from all debts that arose before bankruptcy."). The Court's construction of CERCLA § 107(a)(4)(B) should not create a judicial exception to discharge for private PRPs, particularly when the resulting restriction on powers otherwise exercisable by a Bankruptcy Court would not be part of "a judicially developed doctrine intended to protect legitimate state or federal interests." *Midlantic Nat'l Bank*, 474 U.S. at 500-01, 507 (given "well-recognized restrictions on a trustee's abandonment power," a trustee may not abandon property in contravention of a state statute or regulation reasonably designed to protect the public heath or safety).

Until now, courts have been able to avoid the harm to bankruptcy discharges posed by PRPs using CERCLA § 107(a)(4)(B) for three principal reasons. First, after CERCLA's enactment, "the courts did not for several years interpret § 107(a) as containing" a private right of action even though they conceivably could have interpreted "§ 107(a)(4)(B)'s private right of action as emerging fully formed with the passage of CERCLA...." *Reading*, 115 F.3d at 1123. Second, after SARA's enactment, most courts barred PRPs from using CERCLA § 107 exclusively to assert liability, *see Cooper*, 543 U.S. at 169 (citing cases), or at the very least limited the availability of CERCLA § 107 to innocent landowners who had not polluted their property.[6]

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6 Private CERCLA § 107 claims brought by such landowners do not pose any threat to the working of the bankruptcy system. Under the tests of *National Gypsum* and *Chicago, Milwaukee*, a basis for knowledge such landowners may have can be identified and evaluated because landowners would be within a chain of title, near, or adjacent to a contaminated site. No similar basis exists for generators, transporters, or arrangers for disposal, of hazardous substances – the vast majority of PRPs.

New Castle County, 111 F.3d at 1123; *AM Int'l, Inc. v. Datacard Corp.*, 106 F.3d 1342, 1347 (7th Cir. 1997). Third, when it recognized a private right of action to exist under CERCLA § 107(a)(4)(B) in *Key Tronic*, this Court did not decide whether the CERCLA § 107(a)(4)(B) action was one for contribution or cost recovery. *Cooper*, 543 U.S. at 170; *see also Key Tronic*, 511 U.S. at 816-17.

Now, however, the case before the Court squarely presents the issue of the availability of CERCLA § 107 to PRPs. And, as the foregoing analysis demonstrates, the construction this Court gives to CERCLA § 107(a)(4)(B) could have far-reaching impacts on the ability of a reorganized company or a discharged individual to obtain a fresh start from a bankruptcy proceeding.

For several fundamental reasons, therefore, Reading urges this Court to hold that CERCLA § 107(a)(4)(B) is not available to private PRPs. First, as noted above, recognizing such a private right will diminish the value of any settlement of CERCLA liability reached with the government and will greatly complicate and prolong bankruptcies. Second, as a practical and legal matter, all such claims could not be recognized and discharged in a bankruptcy. Consequently, the recognition of such a right will prevent a bankruptcy proceeding from discharging contingent CERCLA liabilities and leave the reorganized company or debtor open to an endless series of after-bankruptcy claims. That result is irreconcilable with the most profound purpose of bankruptcy proceedings and should be foreclosed by this Court's construction of CERCLA § 107(a)(4)(B).

B. If A Right of Action Under CERCLA § 107(a)(4)(B) Is Provided For PRPs Ineligible To Use CERCLA § 113, Then That Right Of Action Should Be Characterized As An Implied Right Of Contribution To Accommodate The Purposes Of Bankruptcy Proceedings.

If this Court nevertheless construes CERCLA § 107(a)(4)(B) to be available to PRPs ineligible to use CERCLA § 113, then, to accommodate the purposes of bankruptcy, this Court should construe the right of recovery PRPs would exercise under § 107 as an implied right of contribution. Such a construction would preserve the concept of common liability which, in turn, could serve, as in *Reading*, to prevent private CERCLA claims from circumventing the effects of bankruptcy. Moreover, a basis for such a construction can be found in pre-SARA cases interpreting CERCLA § 107, and exists despite the lack of a need for prior governmental action in a CERCLA § 107 suit.

As it noted in *Cooper*, "this Court has visited the subject of implied rights of contribution before," albeit in cases not involving CERCLA, and it views as "debatable" the conclusion, reached by courts before SARA's enactment, that a right to contribution "arose either impliedly from provisions of the statute, or as a matter of federal common law." *Cooper*, 543 U.S. at 162 & 171. The skepticism the Court expressed about pre-SARA cases, however, did not concern pre-SARA cases addressing "whether a private party that had incurred response costs, but that had done so voluntarily and was not itself subject to suit, had a cause of action for cost recovery against other PRPs." *Cooper*, 543 U.S. at 161. Rather, the Court's skepticism centered around cases dealing with "the separate question whether a private entity that had been sued in a cost recovery action (by the Government or by another PRP) could obtain contribution from other PRPs." *Id.*

Review of the three pre-SARA cases this Court cited in which private parties used CERCLA § 107(a)(4)(B) "for cost recovery" shows how common liability to a third person can play a role in characterizing the right of recovery as a contribution action when a PRP brings it. *Cooper*, 543 U.S. at 161-62.

In the earliest pre-SARA case cited, *Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982), there had been "no expenditure of superfund monies nor [had] the federal or state government commenced an action against ... anyone" seeking a cleanup. *Id.* at 1142. Even though it did not call the CERCLA § 107(a)(4)(B) action it allowed Philadelphia to bring a contribution action, the *Stepan Chemical* Court nevertheless described § 107(a)(4)(B) as giving "a private party the right to recover its response costs *from responsible third parties* which it may choose to pursue...." *Id.* at 1143 (emphasis added). The PRP thus could use CERCLA § 107 to recover its costs even though it was "admittedly the owner of the ... site, and might have been liable to the federal or state governments had those entities commenced the cleanup...." *Id.* at 1143.

While *Stepan Chemical* allowed a PRP to use CERCLA § 107(a)(4)(B) to recover costs when the PRP was potentially liable to the government, the second case, *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887 (9th Cir. 1986), allowed a PRP to use CERCLA §107(a)(4)(B) to recover costs it had incurred even though California had not asserted liability for costs the government had incurred. Since the California Health Department had incurred costs to study the contaminated site, there was no doubt that the PRP in *Wickland Oil Terminals* actually was liable to the state. *Id.* at 889. The Ninth Circuit accordingly held that the PRP, which had acted voluntarily to address the conditions brought to its attention by the state, could use § 107(a)(4)(B) to recover its costs. *Id.* at 892.

In the third case, *Walls v. Waste Resource Corp.*, 761 F.2d 311 (6th Cir. 1985), the Sixth Circuit considered a case brought by "a group of residents and homeowners" against "the owner, operators and users" of "a waste dumping ground" near their town. *Id.* at 313-14. The Sixth Circuit allowed the homeowners' group "to recover costs from responsible parties under" CERCLA § 107(a)(4)(B) but did not characterize the plaintiffs before it as PRPs. *Id.* at 318. The reason was plain enough. The homeowners in *Walls*, as innocent persons acting in response to the threat of pollution they did not cause, are the "other" persons referred to in CERCLA § 107(a)(4)(B) who are not PRPs, have incurred costs, and seek to recover them. Under what in this case the government has referred to as "[t]he most natural reading of the phrase 'any other person'" in CERCLA § 107(a)(4)(B), the homeowners in *Walls* are the very persons entitled to sue PRPs. *See* 2006 WL 3024300, at *15.

In contrast to *Walls*, the PRPs in *Stepan Chemical* and *Wickland Oil Terminals*, as persons potentially or actually liable to the government under CERCLA § 107(a), stand in an entirely different position with respect to the right of recovery under CERCLA § 107(a)(4)(B). If it allows use of CERCLA § 107 by PRPs ineligible to use CERCLA § 113, their common liability to the government, whether it is actual or potential, should lead this Court to characterize their use of CERCLA § 107(a)(4)(B) as an action for contribution. The effort to apportion CERCLA liabilities between parties who are conceivably liable to the government – in short, between PRPs – involves common liability to a third party and is analogous to common-law contribution. The only difference is the element of compulsion, since a PRP invoking CERCLA § 107(a)(4)(B) in these circumstances would not have been sued by the

government.[7] However, given this contribution construction, a reorganized company sued after bankruptcy by a PRP under CERCLA § 107(a)(4)(B) could block the PRP's claim as a matter of law, just as the CERCLA § 113 claims were blocked in *Reading*, by demonstrating that its discharge in bankruptcy settled its CERCLA liability to the government for the site in question. This construction, in turn, would reconcile, to the greatest extent possible, the purposes of CERCLA and those of bankruptcy.

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[7] This Court has cited post-SARA decisions from the First, Second, Third, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuit Courts of Appeal which barred PRPs from pursuing a § 107 action against other PRPs for joint and several liability. *Cooper*, 543 U.S. at 169 (citing cases). In doing so, the Court stated that, in order to decide if a PRP ineligible to use CERCLA § 113 could use CERCLA § 107, it would need "to consider whether these decisions are correct...." *Id.* All but one of the cited cases involved a cleanup coerced by suit, unilaterally ordered, or performed under a consent order. Significantly, however, in the one cited case in which the PRPs cleaned up voluntarily, without any governmental order or suit, the Ninth Circuit categorized the PRPs' claims as contribution claims and noted that "while § 107 created the right of contribution, the 'machinery' of § 113 governs and regulates such actions, providing the details and explicit recognition that were missing from the text of § 107." *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1300-02 (9th Cir. 1997).

C. If A CERCLA § 107(a)(4)(B) Right Of Action By PRPs Ineligible To Use CERCLA § 113 Is Characterized As One For Cost Recovery, Reorganized Companies And Discharged Individuals Who Have Settled Or Discharged CERCLA Liability To The Government In Bankruptcy Should Not Be Subject To Suit In Such Actions.

Reading agrees, as the United States has argued in its petition for certiorari, that allowing PRPs to use CERCLA § 107 to recover costs when they could not use CERCLA § 113 would render § 113 "effectively superfluous" and allow circumvention of the settlement bar codified at CERCLA § 113(f)(2). 2006 WL 3024300 *18. If this Court should conclude, however, that use by such PRPs of CERCLA § 107 would not render CERCLA § 113 superfluous or circumvent the settlement bar found at CERCLA § 113(f)(2), the rationale underlying such a conclusion concomitantly should protect any settlement or discharge which has occurred in or as a result of a bankruptcy. Just as any construction of CERCLA § 107 made in this case should assure the continuing integrity of CERCLA § 113, so should it also insure the continuing vitality of a discharge granted to a debtor which settles or discharges CERCLA liability to the government during a bankruptcy. To achieve the purpose and protect the integrity of a bankruptcy proceeding, whether the debtor has settled CERCLA liability to the government, or the bankruptcy has discharged that liability without a settlement, the resolution of the debtor's CERCLA liability should preclude the assertion by a PRP, after a reorganization or liquidation has ended, of a CERCLA § 107(a)(4)(B) action against the former debtor for operations which ended with or before bankruptcy.

III.

CONCLUSION

As the foregoing analysis provides, this Court's ultimate construction of CERCLA § 107(a)(4)(B) should consider its implications for reorganizations and liquidations, including, most significantly, the impact on the fresh start intended for the debtor who emerges from bankruptcy. This Court's ultimate construction should limit, rather than heighten, any conflicts between CERCLA and bankruptcy law.

Respectfully submitted,

JAMES C. MARTIN*
ROBERT P. FRANK
REED SMITH LLP
2500 One Liberty Place
1650 Market Street
Philadelphia, PA 19103-7301
Telephone: 215.851.8100
Facsimile: 215.851.1420
*Counsel of Record

Counsel for Amicus Curiae Reading Company